

***United States Court of Appeals
for the Second Circuit***



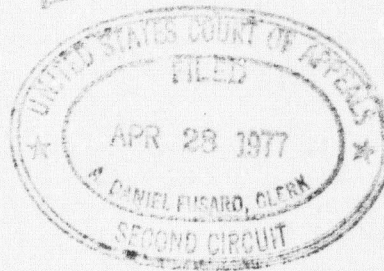
**BRIEF FOR
APPELLEE**

77-70881

To be argued by
ROBERT S. HAMMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
ROBERT HUDSON, :
 :
 Plaintiff-Appellant, :
 :
 - against - :
 :
 THE ATTORNEY GENERAL OF NEW YORK STATE, :
 LOUIS J. LEFKOWITZ, :
 :
 Defendant-Appellee. :
-----x



BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS
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LOUIS J. LEFKOWITZ, :
Defendant-Appellee. :
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BRIEF OF APPELLEE

Question Presented

Did plaintiff's complaint state a claim entitling him to relief?

Statement of the Case

This is an appeal from a judgment of the District Court for the Southern District of New York, dated January 20, 1977 granting defendant's motion to dismiss the complaint.

Plaintiff alleged that the defendant, the Attorney General of the State of New York has permitted a failure of justice. He sought a mandatory injunction permitting him to institute criminal charges against "each and every person who has committed a criminal offense against Robert Hudson and to have these charges impartially weighed by a grand jury investigation." (Cplt. pp. 1-2).

The complaint did not state the basis of the District Court's jurisdiction. However, from the nature of the allegations jurisdiction would rest, if at all, on 42 U.S.C. § 1983, 28 U.S.C. § 1343.

Plaintiff alleged that injustices were perpetrated against him by both the bench and the bar in connection with a contract for the sale of plaintiff and his wife of real property in Putnam County, New York and a criminal prosecution against him for assault and related charges in New York City.

In the first case, it appears that, plaintiff had entered into a contract for the sale of real property. After it was claimed that he breached the contract, the downpayment of \$3,200 was apparently withheld. Plaintiff claims that the various attorneys and the court judge misconducted themselves. However, he annexes a decision in a case in which he successfully sued the buyer and his lawyer for the \$3,200. (Hudson v. Alexander, Putnam Co. Ct. #679/74). His additional complaints seem to stem from the fact that the District Attorney and other authorities including the Attorney General would not prosecute his criminal and disciplinary complaints and that he was apparently physically restrained from interfering with the grand jury when he would not take "no" for an answer (Cplt. pp. 5-10 and decision and other exhibits).

In the other incident, plaintiff claims that he was in a friend's apartment when the police attempted to search it; that he was assaulted by them but was himself arrested for assault and related misdemeanors. A jury trial resulted in acquittal on all charges but a charge of resisting arrest. On the latter the jury could not agree on a verdict. A retrial resulted in a conviction, for which the plaintiff blames the "modish" appearance of his court-appointed lawyer and the misconduct of the assistant district attorney and the Court (Cplt. pp. 12-14).

The defendant answered with a general denial and affirmative defenses of lack of jurisdiction and legal insufficiency of the complaint. He subsequently moved to dismiss or for judgment on the pleadings. The motion to dismiss was granted. The Court held that the Attorney General would not be compelled to maintain a criminal prosecution.

ARGUMENT

THE COMPLAINT IS CLEARLY INSUFFICIENT IN LAW AND BEYOND THE JURISDICTION OF THE DISTRICT COURT. IT WAS PROPERLY DISMISSED.

Perhaps the simplest answer to plaintiff's case is that he sued the wrong defendant. The Attorney General of the

State of New York lacks general prosecutorial functions unless requested by the Governor to supersede a local District Attorney, N.Y. Executive Law § 63(2).

Even where the Attorney General's jurisdiction exists in a particular case, the courts will not review the exercise of his discretion to prosecute or not prosecute in a given instance. Inmates of Attica Correctional Facility v. Rockefeller, 477 F 2d 375, 379-383 (2d Cir. 1973); People v. Bunge Corp., 25 N Y 2d 91, 97 (1969). This is in line with the similiar exercise of discretion by the U.S. Attorney. United States v. Kysar, 459 F 2d 422 (9th Cir. 1972); Spillman v. United States, 413 F 2d 527 (9th Cir.) cert. den. 396 U.S. 930 (1969); Pugach v. Klein, 193 F. Supp 630, 634-635 (S.D.N.Y. 1961). Therefore, the effort of the plaintiff to challenge this exercise of discretion is frivolous.

Thus, the Attorney General (and, incidentally the District Attorneys against whom plaintiff also complains) would be immune from suits for damages arising out of their prosecutorial functions. Imbler v. Pachtman, 424 U.S. 409, 427, 431 and f.n. 33 (1976), and see also White, J. concurring at 424 U.S. 438. Assuming, arguendo, that a suit for an injunction to require a prosecutor to institute a criminal

prosecution would be even cognizable in the District Court, Cf. Mitchum v. Foster, 407 U.S. 225, 243 (1972), the principles of comity and federalism would require the exercise of restraint in interfering with the judicial processes of the State, ibid and O'Shea v. Littleton, 414 U.S. 488, 499 (1974); see also Juidice v. Vail, ____ U.S. ____, 45 U.S.L.W. 4269, 4271 (1977).

In the instant case the Putnam Court Court, vindicated plaintiff's civil claim. He was acquitted of all but one of the criminal charges lodged against him in New York City. The complaint does not state whether he ever appealed the "resisting arrest" misdemeanor conviction. He appears not be under any restraint as a result of this conviction. Obviously plaintiff's subjective feelings are not without some basis, however, he has clearly failed to state any cognizable claim against the defendant, Powell v. Workmen's Compensation Board, 327 F.2d 131, 137 (2d Cir. 1964); Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975).

Unfortunately, plaintiff seems to be attempting, in a circuitous way, to seek review of State Court proceedings. This he may not do, Lecci v. Cahn, 493 F.2d 826 (2d Cir. 1974); Murray v. Oswald, 333 F. Supp. 493 (S.D.N.Y. 1971); Jemzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968).

CONCLUSION

THE JUDGMENT APPEALED FROM SHOULD
BE AFFIRMED.

Dated: New York, New York
April 27, 1977

Respectfully submitted,

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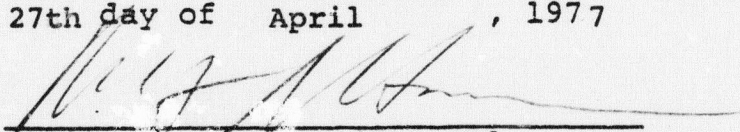
STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

 CONSTANCE TREZZA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Appellee
herein. On the 27th day of April , 1977 , she served
three copies of the
~~the~~ annexed upon the following named person :

MR. ROBERT HUDSON
Appellant Pro Se
3124 Webster Avenue
Bronx, New York 10467

Attorney in the within entitled action by depositing
3 true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that
purpose.

Sworn to before me this
27th day of April , 1977


Assistant Attorney General
of the State of New York